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Supreme Court, U.S.
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No. 96-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY/
UNION PACIFIC RAILROAD COMPANY,
Petitioners,

VS.

CHARLES A. HARPER,
Respondent.

On Petition for Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

REPLY BRIEF TO BRIEF IN OPPOSITION

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The Decision of the Illinois Appellate Court that 45 U.S.C. §60 Pre-empts, or Authorizes a Violation of, State Ethical Rules Barring Certain *Ex Parte* Communications Between an Attorney and the Employees of an Opposing Party Conflicts with the Decisions of a Number of United States District Courts and of the Missouri Court of Appeals, and Aggravates the Existing Split of Authority in the District Courts.

Harper argues there is no conflict between the decision of the Illinois Appellate Court in this case and the decisions in other cases as to the pre-emptive effect of §60 on state rules of professional conduct. He asserts the Illinois Appellate Court's holding that §60 pre-empts RPC 4.2 was based on a factual record not present in the other cases. To the contrary, neither the trial court nor the Illinois Appellate Court found that the pre-emptive effect of §60 was peculiar to this case.

In its permanent injunction order, the trail court specifically found:

> "3. Any state statute or rule that would prohibit plaintiff's counsel from conducting *ex parte* interviews with Defendants' employees regarding facts incident to FELA claimants' injuries is preempted by federal law, 45 U.S.C. 60." (App., A-48)

Similarly, in its opinion, the Illinois Appellate Court stated that:

> "Given the purposefully broad language of section 60 and the courts' uniformly liberal construction of that language, we find that the trial court was within its sound discretion in finding that any state statute or rule, including the Rules of Professional Conduct (13 Ill.2d R. 1.1 *et seq.*), that prohibits plaintiffs' attorneys from conducting *ex parte* interviews with defendants' employees regarding facts

> incident to FELA claimants' injuries is preempted by Federal law." (App., A-39)

The above holdings were stated as rules of law, not dependent upon any factual findings.

Furthermore, there was no finding in this case that the presence of a railroad's lawyer at an employee interview or deposition would create a "direct or indirect chill on the availability of information" concerning Harper's claim. *See, Tucker v. Norfolk & Western Ry. Co.*, 849 F.Supp. 1096, 1101 (E.D.Va. 1994). Information does not have to be obtained *ex parte* to flow freely and voluntarily. *Queensberry v. Norfolk & Western Ry. Co.*, 147 F.R.D. 21, 25 (E.D.Va. 1993)

Harper further incorrectly argues that the permanent injunction in this case will not work to enjoin enforcement of other states rules of professional conduct regarding *ex parte* interviews of employees of a corporate party. On the contrary, the permanent injunction in this case includes a provision that:

> "2. Schlichter, Bogard & Denton and their agents may conduct *ex parte* interviews of Defendants' employees regarding facts incident to FELA claimants' injuries, except when on defendant's property or during the working hours of said employees.." (App., A-48)

Thus, due to the breadth of this language, Harper's attorneys, Schlichter, Bogard & Denton, could and have taken the position that in Missouri, the state of their main office, they are not bound by RPC 4.2 in FELA cases because of the injunction in this case. In the absence of the injunction, however, Missouri would hold Schlichter, Bogard & Denton to the same ethical standard in FELA cases as in any other type of case. *See, State ex rel. Atchison, Topeka, & Santa Fe R.R. v O'Malley,* 888 S.W.2d 760 (Mo.App. 1994)

A Trial Court in Illinois Does Not Have the Authority to Issue Injunctive Relief Under 45 U.S.C. §60 Giving Blanket Authorization to Respondent's Attorneys to Engage in *Ex Parte* Communications with Any and All Railroad Employees.

Harper argues an injunction is not invalid merely because nonparties to the proceeding might benefit from it, citing *Bailey v. Patterson,* 123 F.2d 210, 206 (5th Cir. 1961).[1] This case is distinguishable from *Bailey* which concerned segregation, a practice previously declared unconstitutional by this Court. Unlike segregation, the United States Supreme Court has not declared that a state's enforcement of RPC 4.2 in an FELA case violates §60 of the FELA. In the absence of a definitive ruling by this Court as to the preemptive effect of §60, the trial court in this case did not have the authority to issue a blanket injunction authorizing Schlichter, Bogard & Denton to disregard RPC 4.2 in any FELA case, regardless of the jurisdiction the case is filed in.

The Work Rule Adopted by the Major Western Railroads Governing to Whom Employees Can Give Accident Information to Without the Authorization of a Manager Does not Violate 45 U.S.C. §60.

Harper asserts there is no reasonable explanation for removing the phrase "person in interest" from Rule 1.2.6 other than to prevent employees from giving information to FELA claimants' attorneys. The sworn and uncontradicted testimony was this phrase was removed because it was vague and could include practically anyone interested in a case. (Pugmire, p. 10) Without researching the meaning of "persons in interest" as used in §60, even attorneys regularly practicing FELA law would be un-

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[1] *But see, Zepeda v. United States I.N.S.*, 753 F.2d 719, 727-730 (9th Cir. 1943)

aware of its meaning. Thus, the Railroads' explanation for removing the phrase from the rule is not "wholly unbelievable and absurd" so as to permit the trial court to completely disregard the sworn testimony of the Railroads' Director of Operating Rules. What is absurd is Harper's contention that railroad employees, laymen engaging in manual labor, know that the phrase "persons in interest" is used in §60 of the FELA, and understand the meaning of that phrase in the context of the statute.

The Letter Petitioners were Ordered to Send to Every One of Their Employees Fails to Protect Against Disclosure of Confidential and Privileged Information, and Interviews During Work or on Railroad Property.

Harper argues that the Railroads should not be concerned about employees arranging interviews on company property or during their working hours because of the court-ordered letter. He notes the injunction does not permit FELA plaintiff's counsel to conduct *ex parte* interviews on railroad property or on company time. Yet, the form letter required to be sent to the employees contains no such limitation. The letter itself states the Railroads can do nothing to prevent employees from furnishing information to attorneys for injured workers.

Harper also suggests the Railroads should not be worried about disclosure of confidential reports because the court-ordered letter only refers to statements. Specifically, the letter states, in pertinent part, "Rule 1.2.6 regarding statements should be disregarded." Rule 1.2.6 is entitled Statements and contains

three paragraphs, only the second paragraph of which is at issue in this case.[2] Thus, the letter tells the employees to disregard the entire Rule on Statements, not jut the second paragraph thereof.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

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[2] The entire rule reads as follows:

1.2.6 Statements

Except when authorized by the proper manager:

* Information concerning accidents or personal injuries that occur to persons other than employees may be given only to an authorized representative of the railroad or an officer of the law.

* Information about the facts concerning the injury or death of an employee may be given only to the injured employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad or an officer of the law.

* Information in the files or in other privileged or confidential reports of the railroad concerning accidents or personal injuries may be given only to an authorized representative of the railroad.